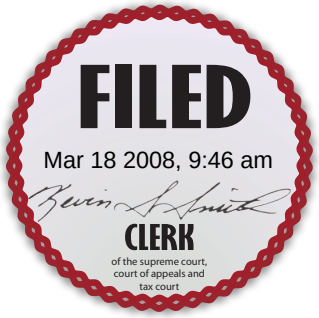

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IN THE
COURT OF APPEALS OF INDIANA

CURTIS MCBRIDE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0703-CR-103
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0603-FA-23

March 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Curtis McBride appeals his conviction for Dealing in Cocaine[1] as a class A felony and Possession of Marijuana[2] as a class D felony. McBride presents the following restated issues for review:

1. Did the State present sufficient evidence to support McBride's dealing in cocaine and possession of marijuana convictions?

2. Is McBride's sentence appropriate in light of the nature of the offenses and his character?

We affirm.

The facts most favorable to the conviction reveal that on March 21, 2006, Elkhart City Police Sergeant Todd Thayer received a complaint from the manager of River Run Apartments regarding apartment 209. Sergeant Thayer and Corporal Laura Robbins went to the apartment and smelled the strong odor of burnt marijuana coming from inside the apartment. Sergeant Thayer knocked on the apartment door, and Fierra Pratcher, who lived in the apartment and was McBride's cousin, opened the door and let the police officers inside. Upon entering the apartment, Sergeant Thayer heard a noise coming from the bedroom and asked Pratcher if anyone else was in the apartment. Pratcher responded that her cousin was in the bedroom. The sergeant then saw a man, who was later identified as McBride, "dash" from the bedroom to the bathroom. *Transcript Volume II* at 30. Sergeant Thayer, concerned that the man might have a weapon or might be trying

[1] Ind. Code Ann. § 35-48-4-1 (West, PREMISE through 2007 1st Regular Sess.).

[2] I.C. § 35-48-4-11 (West, PREMISE through 2007 1st Regular Sess.).

to destroy evidence, walked over to the bathroom door. The bathroom door was open approximately six inches, and Sergeant Thayer saw a man, later identified as Chavez Calbert, standing by the toilet. After Sergeant Thayer heard some "plastic crinkling", *id.* at 32, he attempted to push the door open but was met with resistance and unable to do so because McBride was directly behind the door. Sergeant Thayer pushed the door open and saw McBride standing there with his hand in a plastic bag that was hanging on the back of the door. Sergeant Thayer grabbed McBride and ordered him and Calbert out of the bathroom. Once in the living room, McBride told police his name was Anthony McBride, which was actually his brother's name.

Sergeant Thayer went back to the bathroom to look at the plastic bag in which McBride had his hand and saw that the bag, which was filled with trash, contained baggies of rock-like and plant-like substances—later determined to be cocaine and marijuana—sitting on top of the trash. Specifically, one baggie contained cocaine in two larger pieces and 15 smaller rocks of cocaine packaged in 15 plastic bag corners and had an aggregate weight of 56.49 grams. A second baggie contained 5 pieces of cocaine packaged in 5 plastic bag corners and had an aggregate weight of 1.44 grams of cocaine. The marijuana found was packaged in 49 plastic bag corners and had an aggregate weight of 42.73 grams. During a search of the apartment, the police also discovered in the bedroom a razor knife with a white, flaky residue and a shoe box containing additional cocaine. This cocaine was packaged in 4 plastic bag corners and had an aggregate weight of 1.16 grams. The police also found a handheld, postal-type scale in the bedroom and a box of plastic saran wrap in the living room.

When the police arrested McBride, he asked, "Why isn't anybody else wearing handcuffs?" *Id.* at 48. During a pat down of McBride, the police discovered "a large amount of cash in multiple denominations in each of his pockets." *Id.* at 49. Specifically, McBride had "one $100 bill, a $50 bill[,] $360 worth of 20s, . . . $140 worth of $10 bills, $80 worth of $5 bills, and . . . five $2 bills[.]" *Id.*

The State charged McBride, under the name of Anthony McBride, with Count I, dealing in cocaine as a class A felony, which was based on possession of three grams or more of cocaine with intent to deliver; and Count II, possession of marijuana as a class D felony, which was based on possession of more than thirty grams of marijuana. During the initial hearing, McBride admitted that his name was Curtis McBride and not Anthony McBride, and the State amended the charging informations to correct McBride's name.

A jury trial was held in January 2007. During the trial, McBride objected to the State Police drug analyst's testimony regarding the identification of the cocaine found in the bathroom and bedroom as well as to the admission of State's Exhibits 2 and 4 (the 1.44 grams and 56.49 grams of cocaine found in the bag in the bathroom) and State's Exhibit 5 (the 1.16 grams of cocaine found in the shoe box in the bedroom) based on an insufficient foundation for the calibration of the test instruments. The trial court overruled McBride's objections.

McBride testified on his own behalf and claimed that he was merely visiting his cousin's apartment, that he did not see any drugs in the apartment, and that he neither put anything in the bag in the bathroom nor had his hand in the bag when Sergeant Thayer came in the bathroom. McBride admitted that he smelled the "nice odor" of marijuana

when he came into the apartment, and he admitted that someone was selling drugs out of the apartment but claimed that it was not him. *Id*. at 186. McBride testified that he had a large amount of cash on him because he had just won a bingo game. He also testified that he lied to police and gave them a false name because there was a warrant out for his arrest. The jury found McBride guilty as charged.

When sentencing McBride, the trial court found aggravating factors, including: (1) McBride's criminal history, which included two felony convictions and three misdemeanor convictions; (2) McBride committed the offenses while on parole; (3) lesser sentences have not reformed McBride; (4) McBride had pending drug charges in federal court; and (5) McBride was in arrears on child support. In regard to mitigators, the trial court found McBride's age, problems with addiction, and "other matters mentioned by [McBride's counsel] in the course of his argument", *Reporter's Transcript* at 33, which included having a supportive family and the fact that his prior crimes were less serious. The trial court sentenced McBride to thirty-eight years for his class A felony dealing in cocaine conviction and to a concurrent advisory sentence of one and one-half years for his class D felony possession of marijuana conviction. McBride now appeals his convictions and sentence.

1.

McBride argues that the evidence was insufficient to support his convictions for dealing in cocaine and possession of marijuana. When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review

"respects 'the jury's exclusive province to weigh conflicting evidence.'" *Id.* at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). We will consider only the probative evidence and reasonable inferences supporting the verdict, and we "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

In order to convict McBride of class A felony dealing in cocaine, the State was required to prove beyond a reasonable doubt that McBride possessed three grams or more of cocaine with intent to deliver. I.C. § 35-48-4-1. In order to convict McBride of class D felony possession of marijuana, the State was required to prove beyond a reasonable doubt that McBride knowingly or intentionally possessed more than thirty grams of marijuana. I.C. § 35-48-4-11.

In regard to his dealing in cocaine conviction, McBride contends the State's evidence was insufficient to prove that: (1) he constructively possessed the cocaine; (2) he had intent to deliver the cocaine; and (3) the substance recovered was actually cocaine. In regard to his possession of marijuana conviction, McBride argues the State's evidence was insufficient to prove that: (1) he constructively possessed the marijuana; and (2) the substance recovered was actually marijuana. We will jointly address the constructive possession and drug identification elements of the two convictions and then address the intent to deliver element of the dealing in cocaine conviction.

McBride challenges the sufficiency of the evidence regarding constructive possession of the cocaine and marijuana found in the bathroom. Evidence of constructive

possession is sufficient where the State proves that the defendant had both the intent and capability to maintain dominion and control over the contraband. *Hardister v. State*, 849 N.E.2d 563 (Ind. 2006). The intent element of constructive possession is shown if the State demonstrates the defendant's knowledge of the presence of the contraband. *Goliday v. State*, 708 N.E.2d 4 (Ind. 1999). This knowledge may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. *Id.* These additional circumstances may include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant. *Hardister v. State*, 849 N.E.2d 563. The capability element of constructive possession is met when the State shows that the defendant is able to reduce the controlled substance to the defendant's personal possession. *Goliday v. State*, 708 N.E.2d 4.

Here, as soon as the police arrived at the apartment, McBride ran from the bedroom to the bathroom, where Calbert was already located. Once in the bathroom, McBride went behind the bathroom door and put his hand in a plastic bag that was filled with trash and contained baggies of drugs sitting right on top of the trash. McBride tried to prevent the police from opening the bathroom door and was essentially caught red-handed with his hand in the plastic bag containing over 42 grams of marijuana and almost 58 grams of cocaine. The apartment also contained items consistent with a drug

manufacturing setting, including the large amount of drugs, some of which had already been packaged for individual sale; handheld scales; a razor knife with a white, powdery substance; and plastic wrap. *See* I.C. § 35-48-1-18 (West, PREMISE through 2007 1st Regular Sess.) (defining the manufacture of a controlled substance as "includ[ing] any packaging or repackaging of the substance"). Additionally, McBride lied to police when they asked his name, he had a large quantity of cash on him, and when arrested, he questioned why he was the only one being handcuffed. Given the evidence presented, we conclude the State presented evidence of additional circumstances sufficient to prove that McBride had the intent to maintain dominion and control over the contraband.

The State also presented sufficient evidence on the capability element. Given the close proximity of to the drugs in the bathroom to McBride and his furtive gesture of reaching in the bag, the State presented sufficient evidence to show that he was able to reduce the drugs to his personal possession. *See, e.g.*, *Holmes v. State*, 785 N.E.2d 658 (Ind. Ct. App. 2003) (holding that defendant's close proximity to marijuana found under the driver's seat and the defendant's attempted flight provided sufficient evidence to show capability and intent to exercise dominion and control over marijuana).

Based upon the foregoing evidence, we find that the State presented sufficient evidence that McBride had both the intent and the capability to maintain dominion and control over the drugs. Accordingly, the State presented sufficient evidence that McBride constructively possessed the drugs.

Next, we address McBride's contention that the evidence was insufficient to prove that the substances recovered in the apartment were actually cocaine and marijuana. At

trial, the State Police drug analyst testified that the drugs found in the apartment bathroom and bedroom were cocaine and marijuana. The drug analyst also testified that the instruments used to test and identify the cocaine were calibrated weekly, including the week she tested the drugs from McBride's case. McBride objected to her testimony, arguing that there was an insufficient foundation for the calibration of the test instruments because she did not have documentation establishing that the instruments were calibrated.

On appeal, McBride argues that the State Police drug analyst's testimony regarding the identification of the drugs was insufficient for the jury to find that the items recovered were illegal narcotics because there were "questions" concerning the calibration of the instruments used to test the drugs. *Appellant's Brief* at 8. Citing *Markley v. State*, 603 N.E.2d 894 (Ind. Ct. App. 1992), *trans. denied*, McBride acknowledges that issues regarding the calibration of instruments goes to the weight and credibility of the testimony. McBride's argument regarding the identification of the drugs is nothing more than an invitation to reweigh the evidence and judge a witness's credibility, which we cannot do. *See McHenry v. State*, 820 N.E.2d 124. Accordingly, we conclude the State presented sufficient evidence that the substances recovered in the apartment were actually cocaine and marijuana.

Finally, we address McBride's contention that the State failed to prove that he intended to deliver the cocaine. McBride argues that the evidence of intent to deliver was insufficient because no witnesses testified that they had seen McBride selling cocaine.

Intent, being a mental state, can only be established by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be

drawn from them. *Chandler v. State*, 581 N.E.2d 1233 (Ind. 1991). Circumstantial evidence showing possession with intent to deliver may support a conviction. *Love v. State*, 741 N.E.2d 789 (Ind. Ct. App. 2001). Possession of a large quantity of drugs, large amounts of currency, scales, plastic bags, and other paraphernalia is circumstantial evidence of intent to deliver. *McGuire v. State*, 613 N.E.2d 861 (Ind. Ct. App. 1993), *trans. denied*. The more narcotics that a person possesses, the stronger the inference that he intended to deliver it and not consume it personally. *Love v. State*, 741 N.E.2d 789.

The record indicates that McBride constructively possessed approximately 58 grams of cocaine. Some of the cocaine was packaged in plastic bag corners, presumably for resale. Police found a large amount of cash on McBride, and they recovered a handheld scale, a razor, and plastic wrap from the apartment. Furthermore, the record reveals that no paraphernalia for ingesting or smoking cocaine was recovered by the police when McBride was arrested. *See O'Neal v. State*, 716 N.E.2d 82 (Ind. Ct. App. 1999) (explaining that a defendant's lack of paraphernalia is a factor in determining intent to deal cocaine), *trans. denied*. Based on the evidence presented, we conclude that the State presented sufficient evidence from which the trial court could infer that McBride intended to deliver the cocaine that he constructively possessed.

In summary, the State presented sufficient evidence to convict McBride of dealing in cocaine and possession of marijuana.

2.

McBride also argues that his thirty-eight-year sentence is inappropriate. We have the constitutional authority to revise a sentence if, after consideration of the trial court's

decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. The burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

McBride attempts to minimize the nature of the offenses by arguing that the evidence was insufficient to find him guilty of the offenses. As explained above, however, the evidence was sufficient to support his two convictions. The nature of McBride's two offenses involved McBride's possession of large amounts of cocaine and marijuana as well as the presence of factors indicating that these two drugs were being packaged for sale. Additionally, when McBride was arrested at the scene, he provided a false name to police officers.

As to McBride's character, the record reveals that twenty-four-year-old McBride has a criminal history, which includes two felony convictions for resisting law enforcement and escape and three misdemeanor convictions for possession of marijuana, possession of a handgun without a license, and operating a vehicle while intoxicated. McBride committed his current offenses while he was on parole, and he lied to police officers about his identity when he was arrested. McBride has been found in violation of home detention, and he was in arrears on his child support. Additionally, he had a pending charge of possession with intent to deliver crack cocaine in federal court.

During the sentencing hearing, McBride's attorney acknowledged that McBride was an addict, and in the presentence investigation report, McBride admitted that he had a problem with alcohol and that he started to use marijuana when he was fourteen years old. Indeed, when McBride testified during his jury trial, he admitted that he had used marijuana. All these factors demonstrate McBride's disregard for the law and unwillingness to conform even after receiving criminal punishment.

Based on the nature of the offenses and McBride's character, we conclude that the trial court's imposition of a thirty-eight-year sentence for the commission of class A felony dealing in cocaine and class D felony possession of marijuana is not inappropriate.[3]

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.

[3] As part of his inappropriate sentence argument, McBride also suggests that the trial court erred in weighing the mitigating factors. Our Supreme Court, however, has held that, under the current sentencing statutes, defendants are no longer entitled to challenge the weight given to aggravating and mitigating circumstances. *See Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218.